

CARLSONS' corner

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Confronting the Accused with His Past Convictions

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"Barnstable wouldn't let me do it," Earl fumed. The speaker was Earl Cutler, a fine assistant in my prosecutor office.

"Wouldn't let you do what?" I asked.

"I just finished torching the defendant with his prior for Ag Assault from three years ago," Earl complained. "Then Rocco [the defendant] muttered to the jury, 'It wasn't no big deal. First off, the guy came at me with a beer bottle, and when I put him down I didn't really hurt him much.' Right then I told Judge Barnstable I was going to bring in the two stab wounds that Rocco put in the assault victim. Almost killed him. And Barnstable said 'no.'"

"Why not?" I asked.

"The judge said 'no details,'" Earl said, gesturing with both arms.

Earl was standing in the reception area of our prosecutor's office, fresh from court. He was on his lunch break from the armed robbery trial of *State v. Rocco Costello*. Rocco was a bad actor, and everybody in the office knew his reputation. Earl's face was flushed and I could tell my assistant prosecutor's temperature was reaching the boiling point.

"Did you tell the judge about the Georgia law on contradiction of prior crime details?" I asked.

"What's that?" Earl blurted.

"Well, details of a prior cannot generally be explored by the cross-examiner," I continued, "that is, *except* where the witness attempts to rehabilitate himself by volunteering favorable circumstances of the prior. If he does that, the prosecutor can contradict his version. Sounds like old Rocco did exactly that."

"He sure did," Earl quickly responded. "This is great. I'll get with the judge and the other side as soon as the lunch break is over. Rocco is still testifying, so let me get a couple of those cites." Earl hurried off.

Later that day around quitting time, I spotted a visibly relieved Earl as he cruised into the office. "How did it go?" I asked.

"We got him," Earl exuded. Then he clapped a hand on my shoulder. "I don't think the jury liked the sound of those stab wounds," he said with appreciation.

As is apparent from the foregoing passage that knowledge of Georgia impeachment practice is essential to the "thorough and sifting cross-examination" which the law permits and which vigorous case prosecution requires.

Statutory Framework

Under Georgia law, a witness' credibility can be impeached by the introduction of that witness' conviction of a crime of moral turpitude. Crimes of moral turpitude are defined to include "felonies, infamous crimes, and those that are *malum in se* and disclose a depraved mind."¹

Ordinary witnesses aside, Georgia statutory law carves out a particular exception when the defendant testifies. In the case of a criminal defendant, he cannot be impeached in this way "unless and until the defendant shall have first put his character in issue."² For a defendant to "put his character in issue," generally speaking, he must affirmatively assert that he is not the kind of person who commits crimes such as the one for which he is on trial. This sort of self-elevation is typically essential in order for the State to impeach by means of crimes of moral turpitude. Absent such a representation on the part of the defendant, the state cannot introduce his previous convictions.³

To illustrate, a direct examination by the defense attorney which opens the door might sound something like this:

Q. (By defense counsel) Rocco, were you anywhere near the Kroger supermarket on West Broad Street when this robbery occurred?

A. No. I was with my girlfriend at the Comfort Inn.

Q. Did you do this robbery?

A. No, sir. I don't do stuff like that. I never have, because I'm not that kind of guy. I don't get into trouble.

Rocco has just opened the door to prior crimes impeachment.

Significantly, Georgia law requires a defendant's placing of his character in evidence be a deliberate act.⁴ Mere inadvertent mention of good character on a testifying defendant's part will not suffice to trigger the State's ability to introduce certified copies of prior convictions to impeach.⁵

Federal Prosecutorial Practice

The Federal Rules of Evidence simplify the process by operating under the assumption that once a criminal defendant chooses to testify, "he places his credibility in issue as does any witness."⁶ Under the federal rules, a criminal defendant's prior convictions for felonies are admissible after the court has balanced their probative value against their prejudicial effect. Generally, they must be within ten years of the date of conviction.⁷ Significantly, the court has no such discretion when it comes to crimes involving dishonesty, which are admissible against the testifying defendant without an exercise of discretion on the part of the court.

Methods of Proof: The Conventional Method

Georgia law requires introduction of a certified copy of a conviction for impeachment purposes.⁸ As demonstrated at the outset of this article, the underlying facts of the impeaching offense are not relevant and cannot be introduced, absent a defendant's attempt to offer self-serving declarations to rehabilitate the witness.⁹

Methods of Proof: Cross-Examination

Federal courts, in most instances, do not require formal introduction of the records of conviction. Cross-examination about prior offenses is all that is needed, as long as a factual basis exists for the cross.¹⁰ Under federal rules, however, the cross-examiner is required to limit questions concerning prior crimes to the number of prior convictions, the nature of each of the crimes charged, and the date and place of each conviction.¹¹ Increasingly, Georgia courts are recognizing this mode of impeachment. Unless a defendant objects on best evidence grounds, the prosecutor can proceed by way of cross-examination. If the cross-examiner is objected to, however, she must resort to the certified copy method of proving up the conviction.¹²

Rebutting Versus Impeaching: Broader Horizons

What about the circumstance where the defendant fails to put his character at issue, but takes the witness stand and falsely denies past criminal conduct or misdeeds? A judge who is into "hair splitting" might disallow general impeachment by prior conviction, but allow production of defendant's priors to rebut. Georgia law allows the State to introduce evidence that reflects negatively on the defendant's character in order to rebut the false impression left by such a mischaracterization.¹³ In other words, prior bad acts that might otherwise be inadmissible are allowed when introduced to impeach specific fallacious representations on the part of the accused.¹⁴ A defendant's testimony in one case that he was a "good man," for instance, triggered the State's ability to proceed in this regard.¹⁵

Significantly, rebuttal allows for the introduction of a broader scope of bad acts than does the law of impeachment with prior convictions involving crimes of moral turpitude. A defendant's arrest record was deemed admissible to rebut representations that the defendant had "never been in trouble."¹⁶ In another decision, misdemeanor criminal trespass convictions were admitted after the defendant testified that he "had never done anything wrong."¹⁷ A defendant's assertion that he had never dealt with drugs opened up proof of defendant's prior plea to misdemeanor possession of marijuana.¹⁸

Similarly, federal courts have allowed prosecutors to go beyond the ten year limitation generally imposed for impeachment by means of prior conviction. Cross-examination about a 12-year-old conviction was deemed proper to impeach the defendant's testimony because he "opened the door."¹⁹ In another case, evidence of two convictions which were more than ten years old was allowed because of testimony by the accused that he had only been convicted one time previously.²⁰

Rebutting Mischaracterizations in Opening Statements

The rebuttal rule also applies to representations made by counsel in opening statements. In one case, during opening statement defense counsel stated that his client had never been in trouble before and was a good kid. The State was allowed to introduce the defendant's juvenile record to contend with the falsehood.²¹

The End Run: Impeaching "Good" Character Witnesses

A defendant may call a "good character" witness, one who will take the stand and testify as to the defendant's "general good reputation."²² Those witnesses may be confronted with questions about whether they knew of the defendant's prior convictions, and more. Informed about the priors, the "good character" witnesses may then be asked if their opinion of the accused would change or had changed upon learning of them.²³ In the case of character witnesses who supply representations of the defendant's goodness, impeachment is not limited to conviction of crimes of moral turpitude. The defendant's arrest record has been ruled a proper form of impeachment here.²⁴ Even the fact that the defendant falsely held himself out to be a lawyer has been deemed admissible for this purpose.²⁵ Georgia law requires that the impeaching material come from reliable sources, such as the Georgia Crime Information Center report in the case of prior arrests.²⁶ Interestingly, once a "good character" witness is called, prosecutors are allowed to impeach subsequent defense witnesses with an accused's prior bad acts, even ones that were not called as good character witnesses.²⁷

The Federal Rules of Evidence also allow for broad questioning of good character witnesses called by the defense. This inquiry could properly be made in the form of "have you heard" questions, exploring the defendant's prior bad acts.²⁸

Conclusion

Mere arrests are normally incompetent. However, as the foregoing analysis suggests, in special circumstances, these arrests can come back to haunt the accused. So can prior convictions.

When a criminal defendant testifies, a Georgia prosecutor is

presented with a plethora of potential opportunities. However, she must proceed in accord with established law. Trial counsel is understandably wary of haphazardly venturing down any road that may end in mistrial or reversible error. Furthermore, absent solid legal authorization, counsel may find herself in the doghouse with a presiding judge who is not favorable to the impeachment strategy which she employs.

At the same time, a bold impeachment strategy is often needed to do justice. The revelation that the defendant is hardly an altar boy can be an important determinant for the State to establish. Quite simply, just who this person is and whether he can be believed is critical to the jury's assessment of the case. This factor is intensified if the defense has characterized the accused glowingly. Accordingly, this article has supplied a brief, practical explanation of instances when exploration of a defendant's past misconduct becomes a relevant and useful endeavor.²⁹

Endnotes

1. *Hawes v. State*, 266 Ga. 731, 733-34, 470 S.E.2d 66, 667 (1996).
2. O.C.G.A. § 24-9 - 20(b).
3. *Mann v. State*, 273 Ga. 366, 370, 541 S.E.2d 645, 648 (2001).
4. *Jones v. State*, 257 Ga. 753, 758, 363 S.E.2d 529, 533 (1988). However, a criminal defendant may succeed in putting his character in issue while cross-examining a State's witness, whereupon the State has a right to rebut by introducing copies of convictions from crimes of moral turpitude to prove general character. *Franklin v. State*, 251 Ga. 77, 80-81, 303 S.E.2d 22, 25 (1983).
5. *Richardson v. State*, 173 Ga. App. 695, 696, 327 S.E.2d 813 (1985). How a defendant places his character in issue, see *Zellner v. State*, 260 Ga. 749, 757, 399 S.E.2d 206, 207 (1991)(a passing reference to his record does not place defendant's character in evidence). Defendant's character was not placed in issue in *Eagle v. State*, 264 Ga. 1, 440 S.E.2d 2 (1994).
6. *United States v. Vigliatura*, 878 F.2d 1346, 1350 (11th Cir. 1989).
7. Fed. Rule Ev. 609. See generally *Luce v. United States*, 469 U.S. 381, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984).
8. *Smith v. State*, 222 Ga. App. 366, 369-70, 474 S.E. 2d 272, 276 (1996).
9. *Vincent v. State*, 264 Ga. 234, 235, 442 S.E.2d 748, 750 (1994).
10. See generally *Obler v. United States*, 529 U.S. 753, 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000).
11. *United States v. Tumblin*, 551 F.2d 1001, 1004 (5th Cir. 1977).
12. *Harwell v. State*, 270 Ga. 765, 768, 512 S.E.2d 892, 895 (1999). For additional cases, see R. Carlson, Trial Handbook for Georgia Lawyers § 16.12 (3d ed. 2003).
13. *Walker v. State*, 260 Ga. App. 241, 581 S.E.2d 295 (2003).
14. *Jester v. State*, 229 Ga. App. 490, 491, 494 S.E.2d 284, 286 (1997).
15. *Anthony v. State*, 236 Ga. App. 257, 259, 511 S.E.2d 612 (1999).
16. *Walker v. State*, 260 Ga. App. 241, 581 S.E.2d 295 (2003).
17. *Gaither v. State*, 194 Ga. App. 213, 214, 390 S.E.2d 113, 113-14 (1990).
18. *St. Romaine v. State*, 251 Ga. App. 212, 213-14, 554 S.E.2d 505, 506 (2001).
19. *United States v. Vigliatura*, 878 F.2d 1346, 1351 (11th Cir. 1989).
20. *United States v. Gates*, 10 F.3d 765, 767 (11th Cir. 1993).
21. *Williams v. State*, 171 Ga. App. 927, 927-28, 321 S.E.2d 423, 424 (1984).
22. See O.C.G.A. § 24-2-2; *Walker v. State*, 264 Ga. 676, 677-78, 449 S.E.2d 845, 847 (1995).
23. *Thompson v. State*, 265 Ga. 677, 532 S.E.2d 528 (1995).
24. Id. at 678-79, 532 S.E.2d at 529-30.
25. *Davidson v. State*, 231 Ga. App. 605, 610-11, 499 S.E.2d 697, 704-05 (1998).
26. *Thompson v. State*, 265 Ga. 677, 678-79, 461 S.E.2d 528, 529-30 (1995).
27. *Johnson v. State*, 270 Ga. 234, 238-39, 507 S.E.2d 737, 742 (1998).
28. *United States v. Collins*, 779 F.2d 1520, 1532 (11th Cir. 1986).
29. Bills have been advanced in the Georgia Legislature to revise the State's impeachment rules. If enacted, the landscape provided by the relevant OCGA sections would be changed considerably, following a pattern more in line with the federal approach. For expanded caselaw coverage of prior conviction impeachment, see R. Carlson, Trial Handbook for Georgia Lawyers §§ 16:11 - 16:12. See also § 12:5, supra.